No. 7740

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY THOMPSON, JOHN MARS,
and DOUGLAS PARKER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR THE APPELLEE.

JOHN B. TANSIL, United States Attorney,
Butte, Montana.

R. LEWIS BROWN,
Assistant United States Attorney.
Butte, Montana.

Attorneys for Appellee.

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For convenience, we shall reply to the various questions raised, or as appellant's say, questions involved in this appeal, in the same order in which they are argued in the joint brief of the three appellants.

I.

SUFFICIENCY OF THE COMPLAINT

The first question argued in the brief is the sufficiency of the complaint to state a cause of action. It is asserted first that as the complaint alleges that

a third party, one Everett Knaus, had and possessed intoxicating liquor upon the premises, the complaint is not sufficient and, second, because the complaint alleges that the liquor was had and possessed, in place of alleging that it was kept, the complaint is not sufficient.

The Montana statute (Sec. 9129, Revised Codes of Montana, 1921) provides what the complaint must contain, as follows:

1. The title of the action, the name of the court and county in which the action is brought and the names of the parties to the action;

2. A statement of the facts constituting the cause of action, in ordinary and concise language;

3. A demand of the relief which the plaintiff claims.

If the recovery of money or damages be demanded, the amount must be stated.

The bond in the action is nothing more or less than a contract, and as applied to contracts, the Supreme Court of Montana, has stated the rule in Borgeas v. Oregon Short Line Railway Company, et al, 73, Mont. 407; 236, Pac. 1069, as follows:

> "The fourth ground of demurrer is the general one that the complaint does not state facts sufficient to constitute a cause of action. It states 'in ordinary and concise language' the facts constituting a contract imposing upon the defendant company a duty, the breach thereof

> and resulting damages, both general and special, and therefore states a cause of action."

Considering whether or not the complaint states a cause of action, the complaint itself is taken by its four corners and construction is given to the complaint as a whole and not to any isolated word or words or sentences in it, in determining whether or not it does state a cause of action.

In addition, of course, where the action, as here, is on a bond provided by statute, the statute itself becomes a part of the complaint.

The bond upon which the action was founded was given pursuant to Section 34 of Title 27, U. S. C. A., providing for the abatement of nuisances for injunction or procedure and a bond by the owner and lessee of the building, and that statute provides, where material, as follows:

> "It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter, but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall

> give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than $500 nor more than $1,000, payable to the United States and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this chapter upon said property."

The first paragraph of the complaint alleges that on the 12th, day of May, 1935, a decree was entered by the District Court restraining one Verberg and the defendant Thompson and all other persons from manufacturing, keeping or bartering any intoxicating liquor, as defined in Section 1 of Title II of the National Prohibition Act, on the property known as the Thompson Hotel and from using such premises as a common and public nuisance, as defined in Section 21 of Title II of the National Prohibition Act, and from using, occupying or permitting said premises to be used or occupied for any purpose for a period of one year, providing, however, that the premises might remain open during said period and occupied for legitimate purposes if Thompson should give a bond in the sum of $1,000, conditioned as in said decree provided. Paragraph II of the complaint alleges that on the 31st day of May, 1930, the appellant Thompson, as principal, and the other two appellants, as sureties, in order that said premises might remain open in accordance with the provisions

of said decree, as aforesaid, made, executed and delivered to the plaintiff, their joint and several bond in the sum of $1,000 and conditioned in part as set out in the complaint, Paragraph III alleges that the defendants wholly failed to perform the condition of the bond in that on or about the 16th day of April, 1931, one Everett Knaus did, upon said premises, wilfully, wrongfully and unlawfully have and possess intoxicating liquor, to-wit, beer, whiskey and wine for beverage purposes, and without permit so to do. Paragraph IV of the complaint contains the allegations of the amount of damage.

Testing the complaint by the rule laid down by the statute and the decisions of the Supreme Court of the State of Montana, it would seem there could not be any question as to the sufficiency of the complaint to withstand the attack of the general demurrer. The complaint alleges the duty on the part of the defendant by alleging the execution of the bond by the appellants. It sets forth the breach and the resulting damages that the appellee sustained by reason of it.

Appellant's urge, however, that because Knaus was not a party to the bond, or, as they say, a stranger, they are not liable for his having and possessing wilfully, wrongfully and unlawfully, intoxicating liquor for beverage purposes and without a permit, upon the premises. A reading of the complaint discloses that the contention is without merit. Thus the com-

plaint alleges that the decree, pursuant to which the bond was given, not only enjoined Verberg and Thompson, but all other persons from doing the things set out in the decree and in the complaint, but that the place might remain, open, be occupied and used for legitimate purposes if the appellant Thompson should give a bond in the sum of $1,000, conditioned as in said decree provided. To sustain appellant's contention in this respect would be to read into the bond itself, and into the decree of the court, provisions that are not contained in there, namely, that the appellant should give a bond conditioned that the appellants themselves would not do the things enjoined in the decree, but would not be liable if some other person did. The tenor of the bond and the tenor of the obligation the appellants undertook in signing the bond was that the premises should be used for honest and legitimate hotel purposes, that the premises would not be used for the violation of any provision of the National Prohibition laws and that intoxicating liquors would not be manufactured, sold, kept, bartered, or otherwise disposed of on the premises abated. The tenor of the bond is that a certain condition would not arise or certain things would not be done upon the described premises and not that the condition would not be caused or the things done by any particular individual. The purpoes of the bond was to keep liquor out of the described premises, not to keep certain persons from

putting liquor in the described premises, but to keep the described premises, free from liquor placed there by anyone. There is no justification in the pleading that liquor was carried into the place by Knaus in a flask, concealed in his pocket. The complaint alleged that Knaus wilfully, wrongfully and unlawfully did have and possess intoxicating liquor, to-wit: beer, whiskey and wine; these words imply certainly more of a quantity of liquor than could posibly be contained in a flask in a person's pocket. If, as appellants suppose, that Knaus was a guest on the premises, the bond covered the act of the guest in bringing beer, whiskey and wine on to the premises for beverage purposes unlawfully and without a permit so to do. Had the bond not been given and the padlock remained upon the building, of course there would then have been no guests in the hotel and no possibility of any guest bringing beer, whiskey and wine into the premises. If, again, Knaus was a guest or an intruder, or for some particular reason his act would not cause a liability on behalf of the appellants under the bond, the most that could be said in their behalf is that such facts constitute a matter of defense and have nothing to do with stating the cause of action.

It is further contended that the complaint is fatally defective as it does not allege that the whiskey was manufactured, sold, bartered or kept on the premises and assigned to the word "kept," the mean-

ing that it must be kept in the sense of the word of keeping a business for the sale of liquor, and to that end, cite several cases in which the word "kept" has been construed with reference to the keeping of gasoline or like articles on premises insured in alleged violations of the terms of certain insurance policies. The courts there held that the keeping of gasoline or prohibited articles of like nature temporiarly was not a violation of the policy. Those cases are certainly no authority on the question here. The first distinguishing feature is that gasoline was not prohibited and contraband article that one was not permitted to possess. The intoxicating liquor that was had in this hotel was at that time a prohibited and contraband article that Knaus had no authority or right to have or possess in the hotel or any place else. Sec. 12, Title 27, U. S. C. Munn v. U. S., Circuit Court of Appeals Ninth Circuit, 4 F. (2d) 380. Keen v. U. S., Circuit Court of Appeals, Eighth Circuit, 11 F. (2d) 260.

It certainly cannot be contended that it would not be a violation of the statute or the decree of the court and of the bond for the appellants to temporarily have or possess intoxicating liquors upon these premises.

Again, the word "kept" does not have the restricted meaning contended for by the appellants as the same is used in this statute. Thus, the statute says that in entering the decree of abatement, "the

Court shall order that no liquor shall be manufactured, sold, bartered, or stored in such * * * house * * *; and that intoxicating liquors shall not be manufactured, sold, bartered, kept or otherwise disposed of." If the word "kept" is to be given the meaning contended for by appellants, i. e., keeping for sale as a business, the word means nothing more than the word sold or bartered as already used in the statute. By alleging in the complaint that Knaus did wilfully, wrongfully and unlawfully have and possess intoxicating liquors for beverage purposes and without a permit so to do, the pleader certainly alleged a breach of the bond and certainly alleged that he kept the liquor on the premises. It is obvious that he could not have it there and possess it there without keeping it there and whether it was kept there or had and possessed there temporarily or permanently it was equally a breach of the bond to have it and keep it there for any period of time whatsoever.

Again, the statute provides that the liquor shall not be otherwise disposed of and in having and possessing the liquor on the premies, the liquor was then otherwise disposed of within the meaning and intent of the statute, the decree of the Court and the bond given to reopen the premises. We do not believe that it can be seriously contended that it was lawful to have and possess this liquor on these premises at the time they were had and possessed temporarily or for any other period of time. The authorities cited

above hold that it was not. Neither do we believe that it can be seriously contended that being unlawful, the decree of abatement of the premises did not abate it for the purposes of having and possessing the liquor in the premises, as well as for the other purposes set out in the decree or that, to adopt appellant's assertion, the bond simply insured against the manufacture, sale or barter of the liquor and did not insure against the having and possessing of the liquor upon the premises abated and reopened under the bond.

If, as appellant's assert, to prevent liability upon themselves, they would have to guard the premises and search all persons seeking to enter thereon, the answer is that they voluntarily assumed the liability and cannot evade it by asserting that it would be highly burdensome to them to insure that the bond would not be breached and an ensuing liability imposed upon them.

We submit that the complaint states a cause of action and the assignment of error in that respect is without merit.

II.

THE MEASURE OF THE RECOVERY UNDER THE BOND.

Appellants contend that the full measure of recovery under the bond is the amount of fines, costs and damages, if any, assessed for a violation of the

National Prohibition Act. Appellants predicate this argument upon the fact that the bond contains the following language:

> "To pay all fines, costs and damages that may be assessed for any violation of the National Prohibition Act."

In making this argument appellants must, of necessity, overlook other more important conditions of the bond than that they quote. It would seem to go without saying that the function of the padlock and the function of the bond, that takes the place of the padlock, was primarily to insure that the nuisance for which the property was abated would not continue, and that the law would not be violated. To accept appellant's contention would place the United States in the position of permitting one to continue the nuisance and violate the law upon condition that a bond be posted that the fines and costs imposed for the subsequent violation of the law would be paid, this in the face of the fact that the United States has ample provisions for collecting fines and costs imposed in criminal actions, through commitments to jail and through the execution and sale of property if a defendant has the property. The bond appears in the record at pages 47, 48 and 49. Its conditions are as follows:

> "THE CONDITION of the above obligation is such that that certain two-story brick building known as the Thompson Hotel, situated on Lots Three (3) and Four (4) of Block Two (2) Orig-

inal Townsite of Sweet Grass, in the County of Toole, in the State and District of Montana, with the exception of the bar room, shall be used for honest and legitimate hotel purposes and that intoxicating liquor will not hereafter be manufactured, sold, bartered, kept or otherwise disposed of in or on said premises, and that said premises will not be used or allowed to be used for or in violation of any of the provisions (57) of the National Prohibition Act and the undersigned sureties will pay all fines, costs and damages that may be assessed for any violation of the National Prohibition Act upon said premises during a period of one (1) year from date hereof, and that the said Harry Thompson, his servants, agents, subordinates, employees and successors and assigns, shall well and faithfully adhere to all the terms and conditions of that certain Decree of the District Court of the United States, District of Montana, Great Falls Division, in the above entitled action made on the 12th day of May, 1930.

"NOW, THEREFORE, if the said Harry Thompson, his servants, agents, subordinates, employees, successors and assigns, shall well and faithfully adhere to all the terms and conditions of the aforesaid decree and shall use the above described premises for honest and legitimate hotel purposes and shall not hereafter manufacture, sell, barter, keep or otherwise dispose of or permit to be manufactured, sold, bartered, kept or otherwise disposed of intoxicating liquor in or on said premises, and shall not use or allow to be used said premises for or in violation of any of the provisions of the National Prohibition Act, and shall pay all fines, costs and damages that may be assessed for any violation of the National Prohibition Act upon

> said premises for a period of one (1) year from date hereof, then this obligation to be null and void and of no effect, otherwise to remain in full force and virtue."

Its first condition is that Thompson will adhere to all the terms and conditions of the decree. One of the conditions of the decree was that all persons be restrained and enjoined from * * * keeping * * * intoxicating liquor upon the premises; another condition of the decree is that the premises shall be used for honest and legitimate hotel purposes; another condition of the bond is that they shall not use or allow to be used said premises for or in any violation of the provisions of the National Prohibition Act. It will thus be seen that while the bond is conditioned for numerous things, appellants' argument, if correct, wipes out all of the numerous conditions that are contained in the bond, makes them as though they were never expressed therein and observes only one of the many conditions, and that is to pay all fines, costs and damages that may be assessed. If appellants' contention is correct, then it necessarily follows that there could be no recovery under the bond unless there were first a prosecution and a conviction. Thus, if the officers had gone into this building and had seen a still in full operation, but were unable to apprehend the owner of the still, there could be no recovery under the bond because they had not been able to apprehend the man operating the still. Again, if the officers had gone

into the property and found a bar completely equipped and liquor being sold, and the operator of the bar had been indicted, but had died prior to his trial, there could be no recovery under the bond, as there would have been no conviction and thus necessarily no fines or costs assessed.

Judge Neterer, in U. S. v. Orth, et al, 59 F. (2d) 774, in denying a like contention, said:

> "Neither nuisance nor forfeiture is dependent on prior conviction on criminal charge; the penal bond removes the padlock and opens the building, but is conditioned effective to keep the whiskey out. This condition is several, and is complete, and seals the building by legal fiction as effectively against keeping intoxicating liquor, etc. therein as did the padlock. The penalty is specific to be paid on doing the prohibited thing against the sovereign will."

Again, in the same case, at Page 776:

> "The penalty became absolute when the condition was violated. Conviction for the act was not necessary, no fine or costs a pre-requisite. The fact that there was a conviction and fine is immaterial as to forfeiture. Whether the payment of the fines and costs, etc. may be claimed as part payment of the penalty of the bond, when the issue is properly raised and effect given to both conditions, is not before the Court, is not considered, and as to which opinion is withheld."

The bond in the case of U. S. v. Amsterdam Casualty Company, 45 F. (2d) 93, was one given on be-

half of the British Schooner Dorin, towed into an American port in distress with a cargo of liquor aboard. As here, a federal statutory bond for a fixed amount was given to the Government. Concerning the subject before the Court here, the Circuit Court of Appeals for the First Circuit said:

> "As pointed out in that opinion, the bond in question is a federal statutory bond for a fixed amount—one given to secure the government for the exact amount of estimated duties on the Dorin's cargo. It would seem, therefore, that it is a penalty or forfeiture bond. If it is and it having been found that it is the defendant's bond and that the condition has been broken, judgment would be for the full amount of the bond; which would not be subject to being chancered. Clark v. Barnard, 108 U. S. 436, 455, 457, 2 S. Ct. 878, 27 L. Ed. 780; United States v. Dieckerhoff, 202 U. S. 302, 26 S. Ct. 604, 50 L. Ed. 1041; United States v. Montell, 26 Fed. Cas. page 1293, No. 15,798; Eagle Indemnity Co. v. United States (C. C. A.) 22 F. (2d) 388; Illinois Surety Co. v. United States (C. C. A.) 229 F. 527."

In Eagle Indemnity Company v. U. S., 22 F (2d) 388, the bond in that instance was given by a ship carrying liquor, towed into a port of the United States in distress, conditioned, among other things, to pay certain charges, and other conditions being forfeiture as in the bond at bar. The Circuit Court of Appeals for the Fourth Circuit held that the bond was severable and part of it being indemnifying and part a forfeiture, the bond can be enforced as to the

conditions of the forfeiture. The Circuit Court of Appeals further said, at Page 391:

> "The Government undoubtedly had in view the prevention of the violation of its laws prohibiting the importation of alcohol or alcoholic liquors. It is unreasonable to presume that, after allowing the Murray the freedom of its waters and harbors, while laden with a prohibited and contraband cargo, she would be allowed to go upon the security of a bond that would require the United States to keep the vessel under surveillance until it had discharged its cargo, a course impossible of being pursued."

It is like the situation here. It is unreasonable to presume that after the Court had found a nuisance existing on this property and the Court had abated the same and padlocked the building, that it would allow the building to be re-opened upon the security of a bond to pay only costs and fines upon the further continuation of the nuisance and thus require the officers of the Government to keep the building under surveillance at all times, to see whether or not the nuisance was being continued and arrest the perpetrator of it, if it were.

The Circuit Court further said, at Page 392:

> "As to where the Murray went or what she did with her cargo, would of necessity be known only to the master and crew of the vessel, and it is not reasonable to presume that the United States Government would enter into such an undertaking, solely upon the security of an indemnifying bond requiring proof of specific

> damages. The Government had the right to take every precaution possible against the violation of its laws, and against its being defrauded of its custom duty. The measure of damages to the Government for the violation of its laws, if any, could not be estimated in dollars and cents. The damage for the failure to present the landing certificate is not computable."

So here, as to what Thompson did with his property would, of necessity, be known only to himself. The Government not only had the right to take every precaution to insure that its laws would not again be violated on this property, but it did so when it padlocked the property, and when the appellants removed the padlock and substituted the bond upon the conditions imposed by the statute, that if its laws would be violated they forfeited One Thousand Dollars, the appellants then at their peril, to save themselves from the forfeiture, should have insured that the laws be not violated on the premises.

The Circuit Court further says, at page 393:

> "Then as to the amount of the damages. This bond is not given in contemplation of an inquiry of a matter of dollars and cents. How much damage is done to this country by the importing into this country of a gallon of intoxicating liquor, there is no possible way of estimating, no way of reducing it to dollars and cents. The obligation of the bond is an absolute one to compel the strict performance of the contract and agreement, and when the contract and agreement is violated, then the whole of the bond becomes absolute."

So here, although appellants say that the bond is conditioned to pay the damages, there is likewise no way of determining the damage or reducing the damage to dollars and cents for the having and possessing upon this property of beer, whiskey and wine for beverage purposes and without a permit so to do, and for the violation of the laws of the United States on the premises. There is no other measure of damage fixed than that the parties agreed that the measure of damage insofar as appellants were concerned would be the full face of the bond. It is further said by the Circuit Court:

> "The obligation of the bond is absolute and the violation of the agreement, set out in the bond, completes the forfeiture, without any obligation upon the Government to prove specific damage."

Reliance is placed upon the decision of Judge Bourquin in U. S. v. Johnson, 51 F. (2d) 312.

If Judge Bourquin's decision is to the effect that the bond simply insures against costs, fines and damages and the other provisions of the bond are to be ignored his decision is contrary to the weight of authority and based upon a misconception of the holding of the Supreme Court of the United States in U. S. v. Zerby, 271 U. S. 332. The Zerby case is discussed at length by the Circuit Court of Appeals for the Fourth Circuit in Eagle Indemnity Company v. U. S., 22 F (2d) 388, and it is there clearly pointed

out that the bonds considered by the Supreme Court were entirely different from the character of bonds considered by the Circuit Court of Appeals in the Eagle Indemnity case and the bond before the Court here.

There is no rule of construction cited by appellants that would permit the Court to disregard all of the other conditions in the bond, as it would be required to do to sustain appellants' contention and we have been unable to find any. We believe the contention made in this respect by appellants to be without merit.

III.

EFFECT OF THE REPEAL OF THE EIGHTEENTH AMENDMENT.

Relying upon the decision of the Supreme Court of the United States, in U. S. v. Chambers, 291, U. S. 217, and United States v. Massey, 291 U. S. 608, 655, 699, appellants contend that the repeal of the Eighteenth Amendment relieves them of the contract obligation they assumed upon signing the bond.

It will be noted here that at the time the statutory bond was given, the Eighteenth Amendment was in effect and the acts of Congress pursuant thereto were all in effect and had not been repealed. Likewise the judgment of abatement was a final judgment. The building would have remained padlocked for the entire year and thus the enforcement of the

decree would have been completed before the repeal of the Eighteenth Amendment.

Upon the breach of the agreement and the bond, the right of the Government to the payment of the money became absolute and the duty of the appellants to pay became absolute. In suing upon the bond, the Government brought its ordinary action at law to collect an obligation due to the United States. It was not dependent in any respect upon any statute enacted by Congress by virtue of the Eighteenth Amendment, in bringing the action, no more so than if the bond had been given to insure the due performance of the lessees of a coal mining lease and the obligation there had been broken.

The decision of the Supreme Court in the Chambers case and in the Massey case were both in cases in which the Supreme Court was considering criminal cases and criminal law. It was obvious in those cases, as pointed out by the Supreme Court that a sentence cannot be imposed upon the defendant there after the repeal of the Eighteenth Amendment, because of the fact that the statute providing for the sentencing of the defendant, the amount of the fines, the length of the jail term had been repealed and fell with the Eighteenth Amendment. However, here, there is no statute providing for the bringing of this action or the recovery of the amount due that the Government is proceding under that depended

for its life upon the Eighteenth Amendment. In Coombes v. Getz, 285 U. S., 434, in considering a like question, the Supreme Court said at page 443:

> "The necessary effect of the repealing act, as construed and applied by the Court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiff's right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation."

We believe that the Supreme Court settled this question adversely to appellants' contention when on May 20, 1935, it decided the case of United States of America v. James A. Mack, et al,........................U. S. .... (The case has not been officially reported and the citation will be given at the oral argument.) That was a case in which the American motor boat Wanda had on board a cargo of intoxicating liquors; the vessel was seized and the crew arrested for an offense against the National Prohibition Act. Thereupon Mack claimed to be the owner of the vessel and gave a bond as principal in the sum of $2,200, conditioned the bond should be void if the vessel was returned to the custody of the Col-

lector on the day of the criminal trial to abide the judgment of the Court. The members of the crew were brought to trial January 26, 1931, and were sentenced on a plea of guilty. The vessel was not returned by the owner at any time to the custody of the Collector. The United States filed its complaint July 19, 1933, against the principal and surety for the value of the vessel, with interest. A motion to dismiss the complaint was made in April, 1934, defendants contending that liability on the bond ended with the repeal of the Eighteenth Amendment. The motion was granted by the District Court and the Circuit Court of Appeals for the Second Circuit affirmed the action of the trial court, 73 Fed. (2d) 265. In reversing the Circuit Court of Appeals and holding that the repeal of the Eighteenth Amendment had no effect upon the Government's action to recover under the bond, the Supreme Court said:

> "Penalties and forfeitures imposed by the National Prohibition Act for offenses committed within the territorial limits of a state fell with the adoption of the Twenty-first Amendment. United States v. Chambers, 291 U. S. 217. Our holding to that effect was confined to criminal liabilities, and had its genesis in an ancient rule. On the other hand, contractual liabilities connected with the Act continued to be enforcible with undiminished obligation, unless conditioned by their tenor, either expressly or otherwise upon forfeitures or penalties frustrated by the Amendment. The Courts below have held that liability upon the bond in suit was condi-

> tioned by implication upon the possibility in law of subjecting the delinquent vessel to forfeiture and sale, and that the possibility must be unbroken down to the recovery of judgment against the delinquent obligors. In opposition to that holding the Government contends that the bond is a contract to be enforced according to its terms; that liability became complete upon the breach of the express condition for the return of the delinquent vessel; and that the liability thus perfected was not extinguished or diminished by the loss of penal sanctions. We think the Government is right."

IV.

ADMISSIBILITY OF THE EVIDENCE.

In support of its case, the United States offered in evidence (R. p. 50), the judgment roll in the case of U. S. v. Everett Knaus, charged in the information with possessing liquor at the Thompson Hotel on the 16th day of April, 1931, and with maintaining a common nuisance within said premises on the said day, and the judgment of the Court (R. p. 56) finding the defendant guilty as charged and fixing his punishment. Appellants contend that this evidence was incompetent and inadmissible and not sufficient to make a prima facie case against the appellants. Appellants argue that Knaus was not a party to the bond nor was he an agent, employee or tenant of any of the parties to the bond. It is true that Knaus was not a party to the bond in the sense of being one of the signors thereon, however, it is equally true

that the giving of the bond by the appellants protected the Government against the act of Knaus in having the liquor upon the premises abated and in maintaining a common nuisance thereon. In this connection it might be interesting to note that prior to this time Knaus had been indicted for selling and possessing liquor in October of 1929 upon the same premises and for maintaining a common nuisance upon the same premises. (R. p. 59). The condition of the bond was absolute that the building abated would thereafter not be used in violation of the National Prohibition Act and the sureties unconditionally obligated themselves that it would not be. (R. p. 48.)

The bond insured the continuing status of the property as remaining lawful, the object to be accomplished by it being that the property itself would not be used in violation of the National Prohibition Act. The judgment against Knaus in the criminal case determined in that case the fact that the property had not been used for lawful purposes, but had been used for unlawful purposes in violation of the law, and the nuisance enjoined against continued. It was that, of course, that created the status or the condition.

There is a diversity of judicial opinion as to the admission in evidence of judgment rolls in criminal cases upon the trial of a civil action. There is not a

great deal of diversity of opinion on the question as to whether they are admissible, the diversity of opinion being largely upon the effect to be given the judgment roll after its admission, some courts holding that the judgment roll is conclusive on the trial of the civil cause, other courts holding that the judgment roll is only prima facie evidence that may be rebutted or overcome by the defendant in the civil suit. That point is not of importance here, for as far as this case is concerned, it makes no difference whether the Court holds that it is conclusive or only raises a prima facie case as the defendants rested with the plaintiff and introduced no evidence whatsoever in their behalf.

Thus, in the case of Eagle Star and British Dominion Insurance Company v. Kellar, 149 Va. 82, 140 S. E. 314, the Virginia Court says:

> "To permit a recovery under a policy of fire insurance by one who has been convicted of burning the property insured, would be to disregard the contract, be illogical, would discredit the administration of justice, defy public policy and shock the most unenlightened conscience."

The Virginia Court thus held the judgment conclusive. On the other hand, the Court of Appeals of the State of New York, in Rose Schindler, Respondent, v. Royal Insurance Company, 179 N. E. 711, says:

> "It would be an unedifying spectacle if the Courts should now apply the strict rule which

> excluded all reference to the judgment of conviction in the civil action as evidence tending to establish the material facts. We shall, however, continue to hold that it is not effective as a plea in bar."

The New York Court thus holding that the judgment in the criminal action is not conclusive but is prima facie evidence of the facts set out. To the same effect, see Sovereign Camp W. O. W. v. Gunn, (Ala) 150 So. 491.

The Supreme Court of the United States has settled the question against the contention of the appellants in the case of Moses, et al, v. United States, 166 U. S. 571. In that action an officer of the Water Department was bonded, after his resignation from the service he was found to be short to a large extent in his accounts. The United States sued him and obtained a judgment against him and then brought an action against the sureties to recover under his bond and upon the trial of the case, introduced the judgment roll in the case of United States v. the Officer Howgate. The sureties urged error in that respect, and in denying the contention, the Supreme Court said (at p. 600):

> "One other objection was taken upon the trial, and that was to the admission of the judgment recovered against Howgate by the Government.
>
> "Neither surety was a party to that judgment, which was solely against Howgate, and the record in that case was admitted in evidence under

> the objection and the exception of the defendants. We are of opinion that the judgment was properly admitted in evidence against the surety. It proved, at least, prima facie, a breach of the bond by showing the amount of public monies which Howgate, the principal, had failed to faithfully expend and honestly account for. It was far beyond the penalty in the bond, and, unexplained, the judgment was sufficient evidence of the breach of the condition. Drummond v. Prestman, 25 U. S. 12, Wheat, 515. U. S. v. Burbank, 71 U. S. 4, Wall, 186, McLaughlin v. Bank of Potomac, 48 U. S., 7 Howard 220; Stovall v. Banks, 77 U. S. 10, Wall 583; Washington Ice Co. v. Webster, 125 U. S., 426."

The question of the admissibility generally of judgments against sureties was considered extensively by the Supreme Court of Error of Connecticut, in the case of City of Bridgeport v. U. S. Fidelity & Guaranty Company, 134, Atl. 252, in which the Court said:

> "The difficulty of again proving the case in which the judgment was rendered, perhaps long after the transaction out of which it arose, and the improbability that an owner would suffer a judgment to be rendered against him which was unjust, either through negligence, or incompetent defense, making its trustworthiness upon its face credible, are among the principal considerations which have led to the very general rule that such a judgment will in an action against a surety of the principal be prima facie evidence of the amount of the recovery, its payment under compulsion, and the cause of action upon which the judgment was rendered. This rule leaves open to the surety any defense he

> might have made had he been a party to the action against the principal. It places the burden of disproving the correctness of the judgment upon the surety. It is a rule of procedure, made for the benefit of the plaintiff litigant, and also made in the public interest. In the great majority of cases of this character the surety cannot successfully attack the judgment upon any of the grounds upon which it has been admitted as prima facie evidence, except for fraud or collusion: hence the rule of procedure tends to shorten litigation without depriving litigants of any substantial rights. The admission of the judgment file for this limited purpose in no wise conflicts with the rule that a judgment concludes none but parties or privies to it."

In Strathleven Steamship Company, Ltd., v. Beaulch, 244 F. 412, in a libel action the steamer Strathleven was found to be solely at fault for the collision with a loaded scow that a tug had in tow. After that action was finally determined the owner of the steamship Strathleven sued the pilot of the Strathleven to recover the loss it sustained. In its action against the pilot it offered the judgment roll in the libel case, to which the pilot had not been a party, in evidence. On this feature of the case, the Circuit Court of Appeals of the Fourth Circuit said:

> "Strictly speaking, the decision in the original case is not res adjudicta as to Beaulch, as he was not a party to the proceeding, but it is res adjudicta as to the finding and conclusion of negligence in the matter of the place and manner of

> anchoring the steamer for which the appellee was responsible, and his liability follows by operation of law."

There the fact determined in the prior case was the fault of the ship, here the question determined in the criminal case was the fault of the premises or building and it would appear, without question, under the authorities that the judgment roll was admissible, to say the least, as prima facie evidence of the fact.

V.

RIGHT TO A JUDGMENT FOR INTEREST.

Interest was claimed in the complaint of the plaintiff (R. p. 4); the jury at the direction of the Court, returned a verdict for the sum of One Thousand Dollars.

That statute of Montana, Section 8662, Revised Codes of Montana, provides:

> "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that date, except during such time as debtor is prevented by law, or by the act of the creditor from paying the debt."

The recovery of the United States under the bond could not be less than One Thousand Dollars. The amount to be recovered was certain. The interest

to be allowed was not within the discretion of the jury, the jury had no discretion as to the giving or the withholding of interest; interest followed as a matter of course under the statute upon the return of the verdict.

In the case of Butte Electric Railway Company v. Matthews, 34 Mont. 487, cited by appellants in their brief is distinguishable here for that the Supreme Court of Montana there held that the interest was awarded by the jury in its verdict and of course interest on interest could not be recovered.

If, however, error was committed in this regard, it is not such error as would warrant the reversal of the entire judgment but could and would be cured by a reduction of that amount from the amount of the judgment. Chicago, Milwaukee, St. Paul & Pacific Ry. Co. v. Busby, 41 F. (2d) 617. Circuit Court of Appeals Ninth.

VI.

DID THE VOLUNTARY APPEARANCE OF THOMPSON GIVE THE COURT JURISDICTION OVER HIS PERSON?

While summons was issued in this action it was never served upon the appellant Thompson, neither did Thompson file any written pleading in the action, either a motion, demurrer or answer, prior to the time of trial. However, Thompson was present

in Court and represented by his counsel, as appears from the judgment in the case at Record page 24, and participated, with his co-appellants, actively in the trial of the case. Thus it appears from the record, at page 27, that objection was made by Mr. Donovan, representing Thompson, as well as the other two appellants, to the introduction in evidence of the first judgment roll, which was offered, one of the objections being that the Court had no jurisdiction over Thompson because he was not served with process, another objection being that the complaint does not state facts sufficient to constitute a cause of action. The objection was overruled and exception taken (R. p. 29). Again, at page 42 of the Record, Mr. Donovan objected to an introduction of evidence on behalf of the appellee on the ground that the Court had no jurisdiction over Thompson or over the sureties or any parties to this action. Such objection was overruled and exception taken. The objection was made by Thompson to each exhibit and all of the evidence offered by the appellee. The record discloses, on page 64, that Thompson again asked the Court for affirmative relief in his behalf by making a separate motion for a non-suit. At that point Thompson had evidently felt the Court had acquired jurisdiction over his person as he did not include jurisdiction over his person as one of the grounds upon which he requested the Court to grant a non-suit and didn't submit that question to

the Court. He excepted to the denial of the Court of his motion for a non-suit. The appellant Thompson rested with the other appellants, none of the appellants in the action submitting any evidence on his behalf whatsoever.

It is the universal rule that jurisdiction of the person may be obtained either by a proper service of process or that process and its service may be waived by a prospective defendant in an action, and a voluntary appearance made by him, the voluntary appearance being as effective in conferring jurisdiction of his person upon the Court as any jurisdiction gained by the service of process. If a defendant desires he may, of course, waive the service of process upon him and always does so by appearing voluntarily in an action. The filing of a pleading in an action is one of the ways, but not the only way that a voluntary appearance can be made. It can be made, as it was here made, when Thompson recognized the fact that an action was pending in Court, came into Court and participated in the trial and asked relief from the Court.

The general rule is laid down in 4 Corpus Juris at page 1334, where it is said:

> "A general appearance is also made by taking part in the trial; by contesting the case on the merits";

Judge Neterer, in Everett Railway Light & Power Co. v. U. S., 236 F. 806, at page 808, said:

> "I think this case must be determined upon the fact as to whether the appearing in Court by the defendant and obtaining the order of enlargement of time to answer was the doing of an act in the progress of the cause, and therefore a general appearance and submission to the jurisdiction of the Court. Appearance means the coming into Court as a party in a proceeding and asking relief in the progress of the cause. Thompson v. Michigan Mutual Ben. Ass'n, 52 Mich. 522, 18 N. W. 247. A party may appear in person or by his agent. Wagner v. Kellogg, 92 Mich. 616, 52 N. W. 1017. And if he does any act or asks any relief from which it may be presumed that he acknowledged the Court's jurisdiction, his act is an appearance. Barbour v. Newkirk, 83 Ky. 529, 532. Obtaining an extension of time to plead, answer, demur, or to take such other action as it may be advised is equivalent to a general appearance. Hupfeld v. Automaton Piano Co. (C. C.) 66 Fed. 788; Biggs v. Stroud (C. C.) 58 Fed. 717; Waters v. Central Trust Co., 126 Fed 469, 62 C. C. A. 45.
>
> "The fact that the motion was made orally does not qualify the appearance. Zobel v. Zobel, 151 Cal. 98, 90 Pac. 191. A defendant having by oral motion caused the Court to make an order in the cause, thereby submitting to and invoking the jurisdiction of the Court, may not thereafter challenge the jurisdiction."

The rule in Montana is that the only manner in which the jurisdiction of the Court over the person of a defendant on the ground that he has not been

served with summons can be made, is by special appearance only, and that unless the appearance is special for that one purpose, the appearance is considered general and the Court obtains jurisdiction over the person. (Hinderager v. MacGinnis, 61 Mont. 312).

In Smith v. Franklin Fire Insurance Company, 61 Mont. 441, the Supreme Court of Montana held that a motion to set aside a default judgment upon the ground that the service of summons was ineffectual for any purpose in that the proper person was not served, constituted a general appearance on behalf of the defendant.

In Glenn v. W. C. Mitchell, 282 Fed. 440, the Circuit Court of Appeals for the Eighth Circuit said, at page 442:

> "We are satisfied, however, that, whatever may have been the defect in the service of the summons, it was waived by the defendant when he filed an application for an order to show cause, and prayed in that application that upon the hearing of the order said judgment might be opened up and defendant permitted to file an answer in the case to plaintiff's cause of action and to defend against the same. This general appearance waived all the defects in the service of the summons if there were any."

The Supreme Court of Idaho, in Miller v. Prout, et al, 197 Pac. 1023, said, at page 1024:

> "The record discloses, however, that upon the trial respondents consented to the introduction

> of certain exhibits on the part of appellants Faull and wife, and also cross-examined Mr. Faull when a witness on his own behalf. We think that participation in the trial of a cause of action by examining and cross examining witnesses therein amounts to a general appearance, and is a waiver of service of process or of a cross-complaint."

To the same effect see Sheldon v. Landwehr (Calif.) 116, Pac. 44.

In Sterling Tire Corporation v. Sullivan (Gerlinger intervenor), 279 F. 336, this Court said, at page 339:

> "Nor do we believe that, when associate counsel for the New Jersey corporation appeared in the later proceeding, the motion of the receiver for instruction and for compensation, counsel's statement that he appeared "specially" can be held to have been a special appearance. Like the action that had been taken previously by first counsel who appeared, the second appearance was in no way limited to objection to the jurisdiction. In both instances counsel recognized the case in Court and actively participated therein. In the one, the bond was prayed for; in the other, counsel sought a continuance of any action in order to learn the facts and wishes of his New Jersey client. The Court evidently considered his suggestions, and counsel signed and approved the order of the Court concerning a contingent voluntary appearance by the New Jersey corporation within a certain time and the disposition by the receiver of the property in the receiver's possession. 2 R. C. L. 327; 3 Cyc. 504; 4 C. J. 1333; Hupfeld v. Piano Co.

(C. C.) 66 Fed. 788; Ex parte Clark, 125 Cal. 389, 58 Pac. 22, Zobel v. Zobel, 151 Cal. 98, 90 Pac. 191; State ex rel, Mackey v. Court, 40 Mont. 359, 106 Pac. 1098, 135 Am. St. Rep. 622."

We respectfully submit that the several specifications of error are without merit, that no error appears in the trial of this cause, and that the judgment of the Court below should be affirmed.

Respectfully submitted,

JOHN B. TANSIL,
United States Attorney for Montana.

R. LEWIS BROWN,
Assistant United States Attorney.

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